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No. 84-875

In the Supreme Court of the United States

OCTOBER TERM, 1984

ARIZONA PUBLIC SERVICE CO., ET AL., PETITIONERS

v.

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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MEMORANDUM FOR THE FEDERAL RESPONDENTS

Petitioners contend that the court of appeals erred in ruling that respondent Salt River Pima-Maricopa Indian Community has standing to assert a claim for cancellation of a contract for the delivery of wastewater from a sewerage treatment plant to a nuclear power plant on the grounds that (1) the United States has unlawfully allowed the parties to that contract to divert the effluent from its required uses for respondents' reservation and (2) respondents cannot obtain complete relief on this claim without the presence of the petitioners.

1. a. The Salt River Pima-Maricopa Indian Community (Community) originally filed this action in

January, 1982, in the United States District Court for the District of Columbia against the United States and the Secretary of the Interior, seeking declaratory and injunctive relief from the Secretary's administration of the Salt River Project, a federal reclamation project in Arizona. The Secretary moved to transfer the case to the United States District Court for the District of Arizona so that other parties affected by the allocation of project water could intervene and protect their interests. Following the transfer of the action, the Community filed an amended complaint (Pet. App. C1-C21) naming additional defendants [1] and asserting five claims for relief.

The Community's first claim for relief is limited to the United States and the Secretary of the Interior. The Community alleged (Pet. App. C5) that the Secretary has violated federal law [2] in administering the Salt River Project, a federal reclamation project, by refusing to deliver project water to the Community. In particular, the Community claimed (Pet. App. C5-C6) that the Secretary has unlawfully excluded

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[1] The petitioners were named as additional defendants, as well as the Salt River Project Agricultural Improvement and Power District, the Salt River Valley Water Users' Association, the Roosevelt Water Conservation District, the Roosevelt Irrigation District, the Cities of Phoenix, Glendale, Scottsdale, Tempe, and Mesa, Arizona, the Town of Youngtown, Arizona, and M-S-R Public Power Agency (Pet. App. C1).

[2] The Community asserted (Pet. App. C2) that the Secretary has acted in violation of the Reclamation Act of 1902, 43 U.S.C. 391 *et seq.*; the Warren (Reclamation) Act, 43 U.S.C. 523-525; the Act of May 18, 1916, ch. 125, § 2, 39 Stat. 130; the Reclamation Project Act of 1939, 43 U.S.C. 485 *et seq.*; and the Due Process Clause of the Fifth Amendment.

Community land from participation in the Salt River Project and has refused to satisfy the Community's water rights.[3] The Community also alleged (Pet. App. C6-C7) that the Secretary has approved or acquiesced in three water delivery contracts which violate federal reclamation laws and diminish project water supplies. Included among these contracts is the contract between the joint owners of the Palo Verde Nuclear Power Plant, including petitioners,[4] and the municipal defendants for the sale of wastewater effluent. The Community claimed (Pet. App. C9) that "[a]lmost all" of the effluent originated from Project sources, remains Project water, and is subject to control by the Secretary. Each of the three water delivery contracts[5] was alleged to violate fed-

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[3] The Community's alleged entitlement to additional quantities of water is based on the following claims: (1) that it has unquantified *Winters* doctrine (see *Winters* v. *United States*, 207 U.S. 564 (1908)) reserved water rights derived from the creation of the Salt River Indian Reservation; (2) that it is not receiving full satisfaction of the Indian water rights set forth in the 1910 Kent Decree of *Hurley* v. *Abbott*, No. 4564 (Ariz. Dist. Ct. Mar. 1, 1910); (3) that it is entitled to more water than it presently receives under the Act of May 18, 1916, ch. 125, §§ 1-2, 39 Stat. 123-130; and (4) that it has the right to share in the developed water created by the Salt River Project on the same basis as lands owned by non-Indian project members.

[4] The Salt River Project Agricultural Improvement and Power District owns a percentage of the nuclear power plant and is a party to the effluent supply contract, but is not a petitioner (see Pet. 5 n.2).

[5] The other two water delivery contracts are between the Salt River Water Users' Association and the Roosevelt Water Conservation District and between the Association and the Roosevelt Irrigation District. Although the court of appeals

eral reclamation law, and the Community sought to have the Secretary "take all necessary actions to suspend or modify them as required by law" (Pet. App. C10).

Only the Community's first claim seeks relief against the United States or the Secretary. The remaining four claims, the Community asserts (Br. in Opp. 3), "are directed against other defendants whose joinder is required to remedy the wrongs alleged in the First Claim." The Community's second claim for relief, brought against the Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association (Salt River Project defendants), repeated the first claim's request that the district court declare the extent of the Community's rights in the Salt River Project water and the right of the Community to membership in the Project. The Community's third, fourth, and fifth claims for relief sought declaratory relief invalidating the three water delivery contracts alleged to violate federal reclamation law. The fifth claim for relief, which concerned the effluent supply contract, alleged (Pet. App. C20) that the proposed sale of effluent "lessens the amount of water available for plaintiff's lands within the project and results in direct and material injury to the plaintiff for which there is not an adequate remedy at law."

b. On August 31, 1982, the Salt River Project defendants, joined by petitioners, moved to dismiss the Community's third, fourth, and fifth claims for

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held that the Community has standing to challenge these contracts as well as the effluent supply contract, only the issue of the Community's standing to challenge the latter is before the Court on this petition.

relief on several grounds.[6] The Roosevelt Water Conservation District also moved for dismissal, asserting that the Community lacked standing to challenge the legality of the three delivery contracts. The district court found (Pet. App. B8) that the Community lacks standing to challenge the contracts and dismissed the three claims of the amended complaint. Relying upon *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982), the district court

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[6] The movants argued that the action should be dismissed because (1) the doctrine of res judicata bars the Community from claiming water rights in addition to the rights determined in the Kent Decree of 1910; (2) the court should abstain in favor of either the continuing state jurisdiction over the Kent Decree or the pending state court general adjudication of water rights to the Gila River, including the Salt River and other tributaries; (3) the Community failed to join indispensable parties; (4) the court lacks jurisdiction to review the actions of the Secretary because such actions are committed to the Secretary's discretion; and (5) exclusive jurisdiction lies in the United States Claims Court (Pet. App. B2-B3).

The United States did not join in the motion to dismiss, and filed a memorandum with the district court taking issue with two of the movants' contentions. First, we disagreed with the res judicata argument that the Kent Decree included the federal reserved rights of the Community. In accordance with our position that the Kent Decree does not preclude the Community from claiming additional water rights in the Salt River, we informed the court that we intend to submit a claim for additional Salt River water on behalf of the Community in the Gila River state court adjudication if the state court is found to have jurisdiction. Second, we disagreed with the assertion that all aspects of the Secretary's administration of Salt River Project water rights are subject to the continuing jurisdiction of the state court with authority over the Kent Decree. The district court has recently dismissed the Community's claim based on the Kent Decree. See page 6 note 9, *infra*.

held (Pet. App. B7) that "the second requirement [of *Valley Forge*] that the challenged action cause the injury such that the remedy sought will likely redress the injury is not presented in the first amended complaint." The court rejected the Community's allegation that the contracts result in direct and material injury to the Community, finding that "[o]ther statements within the amended complaint confirm * * * that the contracts do not cause the Community's injury" (Pet. App. B7). The district court entered judgment pursuant to Fed. R. Civ. P. 54(b), dismissed the Community's third, fourth, and fifth claims for relief, and dismissed all parties other than the United States, the Secretary of the Interior, and the Salt River Project defendants.[7]

c. The Community appealed, and, in an unpublished memorandum opinion, the court of appeals, with one dissent, reversed and remanded (Pet. App. A1-A7). The court held (*id.* at A3-A5) that the district court had erred in concluding that there is an insufficient link between the challenged contracts and the injury the Community sought to redress. The court of appeals reasoned (*id.* at A3):

> [a] ruling on Counts I and II, that the Secretary is violating the Community's rights by its administration of the project and that the Community is entitled to more water than it is presently receiving, cannot afford full relief unless the contracts under which the water is being delivered outside the project are either invalidated or reformed.

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[7] The district court also granted the motion to dismiss insofar as the Community sought an adjudication of its water rights, on the ground that the Community had failed to join indispensable parties (Pet. App. B8). In all other respects, the district court denied the motion to dismiss (*ibid.*).

The court recognized that, under Rules 18 and 19 of the Federal Rules of Civil Procedure, a plaintiff must independently establish jurisdiction over added parties and claims, but the court found (Pet. App. A4) that "the contracts of the joined defendants are sufficiently related to the underlying dispute with the United States to provide the requisite standing." [8] The court therefore remanded the case to the district court.[9]

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[8] The court further noted that "[i]f the district court had doubts whether the relief requested by the Community required adjustment of the contract users' rights, the proper course would have been 'to defer decision until the action was further advanced' " (Pet. App. A3, quoting Fed. R. Civ. P. 19 advisory committee note at 56). Finally, the court of appeals noted (Pet. App. A5) that the district court should reconsider its abstention ruling in light of *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983).

In dissent, Judge Wallace agreed with the district court that "there is an insufficient causal link between the challenged contracts and the injury the Community sought to redress by filing this action" (Pet. App. A6). Judge Wallace also suggested (*id.* at A7) that, if the Community could not obtain complete relief without the presence in this suit of the parties to the water delivery contracts, the Community should have joined those parties in the Community's first and second claims for relief pursuant to Fed. R. Civ. P. 19.

[9] On January 29, 1985, after the petition was filed, the district court issued an order staying the Community's reserved rights claim and dismissing the claim based on the Kent Decree. Relying upon *Arizona* v. *San Carlos Apache Tribe*, *supra*, the court held that the reserved rights claim should be pursued in the pending state court adjudication if the state courts have concurrent jurisdiction over the Community's claims. Because that issue was pending before the Arizona Supreme Court, the district court decided to await the outcome of that suit before ruling on the abstention issue. However, the court held that the Community should look to

2. Petitioners contend that the court of appeals erred by holding that the Community has standing to assert a claim for cancellation of a contract for the delivery of wastewater from a treatment plant operated by several municipalities in the Phoenix metropolitan area to a nuclear power plant for cooling purposes. While the United States and the Secretary are respondents in this Court under this Court's Rule 19.6, neither the United States nor any of its officers or agencies is a party to any of the contracts which the court of appeals held that the Community has standing to challenge. The resolution of this issue thus has no bearing on the separate claims asserted by the Community against the United States, which remain in the district court. We therefore have no direct interest in the grant or denial of the petition. For that reason, we took no position in the court of appeals on the question whether the Community has standing to challenge the water delivery contracts, and we waived our right to file a response in this Court to the petition. However, the Court has now asked the Solicitor General to file a response to the petition. In our opinion, no further review of this case is necessary at this time.

Four allegations in the Community's amended complaint are pertinent to the questions presented by the petition. The Community alleged that (1) it is entitled to membership in the Salt River Project and is

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the state court with continuing jurisdiction over *Hurley* v. *Abbott*, *supra* for enforcement of rights established by the Kent Decree. The district court retained the Community's claims based on the Act of May 18, 1916, ch. 125, 39 Stat. 123 *et seq.*, and on its alleged entitlement to membership in the Salt River Project. The district court's memorandum opinion and order is reproduced in the addendum to this memorandum.

entitled to satisfaction of its water rights from the Salt River; (2) the wastewater that is the subject of the effluent supply contract "is predominantly Salt River Project water" (Pet. App. C20); (3) the effluent supply contract violates federal law because project water cannot be sold for power generation when there is insufficient project water to satisfy project irrigation needs;[10] and (4) the proposed sale of project effluent water, as well as the failure to recapture that water after its use, lessens the amount of water available within the project and results in direct and material injury to the Community.

The question of the Community's standing to challenge the effluent supply contract thus ultimately rests on the Community's contentions that it is entitled to membership in the project and that the effluent is project water subject to the control of the Secretary. We disagree with both assertions.[11] We also

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[10] The Community also alleged that the effluent supply contract is illegal because "project water cannot be sold or disposed of for purposes other than project irrigation except by contract executed by the Secretary of the Interior" (Pet. App. C20).

[11] In a related action currently pending in the United States District Court for the District of Arizona, the effluent supply contract has been challenged on the ground, inter alia, that the Secretary has authority over the reuse of the effluent to the extent it originated as project water. *Long* v. *Salt River Project Agricultural Improvement & Power District,* No. 83-2397 (filed Dec. 12, 1983). We have argued in *Long* that the disposition of Salt River Project effluent water is not controlled by the Secretary and is not preempted by federal law, but instead is subject to state law.

The Community also states that it has "irrigable land lying within the Salt River Project" (Br. in Opp. i). The Project's boundaries as delineated by the Secretary, however, do not encompass the Community's lands.

disagree with the allegation that the sale of the effluent, which is treated at a facility some 20 miles west and downstream (Pet. 6) from the Community, lessens the amount of water available to the Community and thereby results in direct and material injury. The Community may therefore be unable to establish a causal link between the effluent contract and the injury that the Community seeks to redress. Nonetheless, the Community's complaint does allege that the effluent is Salt River Project water that is being unlawfully diverted, rather than "being recaptured for further beneficial use" (Pet. App. C20). Because those allegations must be accepted as true at this stage of the proceedings (see *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)), the court of appeals properly ruled that the Community should be allowed to go forward with its proof of these claims.

The court of appeals' decision does not depart from the principles in *Valley Forge* or *Allen* v. *Wright*, No. 81-757 (July 3, 1984). Instead, after accepting the Community's allegations in its complaint as true for the purposes of determining its standing, the court of appeals simply disagreed with the district court's conclusion that there is an insufficient causal link between the contracts and the injury that the Community sought to redress in this action (Pet. App. A3). That factbound decision does not warrant further review. The court of appeals' unpublished decision does not conflict with the decision of any other court, and it is not even a precedent within the Ninth Circuit (see Pet. App. A1 n.*). The court of appeals' decision is also interlocutory. The court's ruling places petitioners in precisely the same position that they would have occupied if the district court had denied their motion to dismiss the Community's

fifth claim. If petitioners prevail on remand, their present contention will become moot. If, on the other hand, the Community prevails on remand on their claims against petitioners, petitioners will then be able to present their standing claim to this Court, along with any other claims that they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Alternatively, on remand the Community may be able to rectify any insufficiency in its complaint, as Judge Wallace suggested (Pet. App. A7), simply by amending its complaint to add petitioners to its first and second claims for relief. Indeed, it appears that the Community could do so even if the Court were to reverse the court of appeals on the question presented here.

The court of appeals' decision recognizes that the Community's standing to challenge the effluent supply contract (and the other water delivery contracts) is contingent upon the Community's ability to prove the allegations related to the underlying dispute with the United States. As the court of appeals explained (Pet. App. A4), if in fact the Community is not entitled to membership in the Salt River Project, for example, or in fact the effluent is not project water subject to the control of the Secretary, then the Community clearly lacks standing to assert its claim against the petitioners, and those claims would be subject to dismissal. While we are confident that the Community will be unable to substantiate the allegations which the court of appeals has found to provide standing, those questions are not before the Court at this time. Accordingly, further review of the court of appeals' decision is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1985

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 82-745-PHX CLH

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
PLAINTIFF

vs.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed Jan. 29, 1985]

MEMORANDUM OPINION AND ORDER

In its opinion reversing and remanding the judgment dismissing Counts III, IV and V of the amended complaint, the Court of Appeals suggested that consideration be given to "the affect of *Arizona* v. *San Carlos Apache Tribe*, 103 S.Ct. 3201 (1983)." That case was a sequel to *Colorado River Conservation District* v. *United States*, 424 U.S. 800 (1976), which held that (1) the McCarran Amendment, 43 U.S.C. § 666, which waived the sovereign immunity of the United States as to comprehensive state water rights adjudications, provides state courts with jurisdiction to adjudicate Indian water rights held in trust by the

United States, and (2) a water rights suit brougnt by the United States in Federal Court was properly dismissed in favor of a concurrent comprehensive adjudication reaching the same issues in state court. In *San Carlos* the Supreme Court held that if a state court has jurisdiction to adjudicate Indian water rights, concurrent federal suits brought by Indian Tribes, rather than by the United States, and raising only Indian claims, could properly be deferred to the state court suits.

The Indian Community has moved "for an order declaring that [the Court] will proceed to hear plaintiff's Administrative Procedure Act Claim to review the Secretary's decision to exclude the plaintiff's lands from the Salt River Project."

The Salt River Project has filed a motion to dismiss or stay consideration of the Indian Community's claims. The Roosevelt Water Conservation District has filed a motion to defer adjudication of all claims. The Roosevelt Irrigation District has joined in the motions of the Salt River Project and the Roosevelt Water Conservation District. The United States has filed a motion for partial dismissal, which in reality is a motion to strike allegations in the amended complaint relating to the Indian Community's entitlement to water.

The Indian Community alleges that the lands of its reservation have water rights that derive from (1) the Winters Doctrine, (2) the Kent Decree, and (3) the Act of May 18, 1916, 39 Stat. 123.

The Winters Doctrine derives from the Supreme Court's ruling in *Winters* v. *United States*, 207 U.S. 564 (1908), that Indian Tribes located on reservations established by treaties enjoy "reserved" water rights, which vested at the time of the creation of the

reservations. In subsequent decisions the Court has made it clear that the Winters Doctrine applies also to Indian Reservations created by executive order. See, for example, *Arizona* v. *California*, 373 U.S. 546 (1963). Thus, the Indian Community's entitlement to water rights has been established, but the quantification of those rights has not.

An action presently pending in the Superior Court of Arizona in Maricopa County seeks adjudication of all water rights on the Gila River including its Salt and Verde River tributaries. Under *San Carlos, supra*, the quantification of Winters Doctrine water rights would be appropriate in that action. However, there is some question whether the state court has jurisdiction. That question is presently pending before the Arizona Supreme Court. Until that jurisdictional issue is resolved, any proceedings in this case relating to Winters Doctrine entitlements should be held in abeyance.

The Kent Decree was handed down on March 1, 1910, by the District Court of the Third Judicial District of the Territory of Arizona, in the case of *Hurley* v. *Abbott*. It was an extensive adjudication of water rights in the Salt River Valley, and it allocated 12,670 acre feet of water per year to some of the lands of the Indian Community and 6,055 acre feet per year to other lands of the Indian Community. The Court retained continuing jurisdiction of the case. When Arizona became a state, jurisdiction of the case was vested in the Superior Court. The Indian Community should look to the Superior Court to enforce any rights that were established by the Kent Decree.

The Act of May 18, 1916, provides in part:

> "That the Secretary of the Interior is hereby authorized and directed to provide for water rights in perpetuity for the irrigation of six hundred and thirty-one Salt River Indian allotments of ten acres each, to be designated by the Commissioner of Indian Affairs, [from] water from works constructed under the provision of the Reclamation Act, and Acts amendatory thereof or supplement thereto. . . ."

The amended complaint alleges that the Secretary of Interior has never complied with the mandate of the Act and that until 1939 he refused to deliver water to lands of the Indian Community pursuant to the rights he was directed to provide by the Act. During oral argument, counsel for the Indian Community stated that the Commissioner of Indian Affairs had not ever designated the 631 10-acre plots that were to be granted the water rights. The amended complaint also alleges that since 1939 the Secretary has delivered only approximately 20,000 acre feet of water per year and that the 631 10-acre allotments should be entitled to 37,860 acre feet per year. (The Kent Decree includes a finding that 48 miner's inches of water is reasonably necessary for a year's irrigation of 160 acres of land. That converts to slightly more than six acre feet of water per year for each acre of land.) Determining the 631 10-acre plots that are entitled to water rights in perpetuity and determining the amount of water for which there is a right are matters of federal agency action and should not be determined by the state courts.

The Court disagrees with the contention of some of the defendants that any determination of the amount of water to which lands of the Indian Community are entitled pursuant to the Act of May 18, 1916, requires

the joinder of other parties. In 1935 the United States and the Salt River Valley Water Users' Association entered into an agreement whereby the government would pay 20% and the Association 80% of the cost of constructing a dam on the Verde River with the capacity to impound about 200,000 acre feet of water. Among the recitals of the Agreement were (1) a recognition of the provisions of the Act of May 18, 1916, (2) a statement that "arrangements have not heretofore been perfected for carrying out the provisions of the Act," and (3) that "the most feasible means . . . to provide surface water for the Indians of the Salt River Reservation for the irrigation of an additional area of 6,310 acres . . . is by participating in the construction" of the dam. The Agreement provided that the Salt River Indian Reservation was to be alloted one-fifth of all "developed" water, which was defined as all water in the reservoir above the bottom 5%, which was to be reserved to the Association "for regulation of the flow of Verde River which the Association could otherwise divert." In other words, the bottom 5% was the amount of water necessary to provide the "normal flow" of water in the Verde and Salt Rivers that was allocated by the Kent Decree.

Bartlett Dam was constructed pursuant to the 1935 Agreement. Since the completion of the dam in 1939, the only direct users of developed water have been the Salt River Project and the Indian Community. Consequently, the relative rights of the Project and the Community to use the developed water is not a matter of general stream concern nor of state court concern.

This case is more than a water rights adjudication action. The first claim for relief of the amended complaint charges the Secretary of Interior with in-

vidious discrimination against members of the Indian Community by excluding their lands from the Salt River Project's water service area and by denying them the right to vote in the Project's managing council elections and by denying members of the Community ample waters to irrigate their lands when hundreds of thousands of acre feet of Project water are being delivered to users outside the boundaries of the Project.

The second claim for relief accuses the Salt River Project of invidious racial discrimination by failing to deliver water to reservation lands on exactly the same basis as all other lands in the Salt River Project, by excluding Indian lands within the Salt River Project from sharing in the water delivery benefits that are accorded to all other lands in the Project and by denying members of the Indian Community the right to vote in the Project's public elections and the right to hold seats on the Project's management councils.

The third and fourth claims for relief in the amended complaint challenge the legality of contracts of the Salt River Water Users' Association with the Roosevelt Water Conservation District and the Roosevelt Irrigation District for the delivery of water outside the boundaries of the Salt River Project.

The fifth claim for relief challenges the legality of a contract of the defendant cities with the owners of the Palo Verde Nuclear Generating Station for the sale of sewage effluent.

Arizona Public Service Co. has petitioned the Supreme Court for a writ of certiorari to obtain review of the Court of Appeals ruling in this case. All proceedings relating to the third, fourth and fifth claims for relief should be stayed until the Supreme Court has finally ruled.

IT IS ORDERED as follows:

1. The Indian Community's motion "for an order declaring that [the Court] will proceed to hear the plaintiff's administrative procedure act claim to review the Secretary's decision to exclude the plaintiffs' lands from the Salt River Project" is granted.

2. The motion of the Salt River Project and the Roosevelt Irrigation District to dismiss or stay consideration of plaintiff's claims is denied.

3. The motion of the Roosevelt Water Conservation District and the Roosevelt Irrigation District to defer adjudication of all claims is denied.

4. The motion of the United States for partial dismissal is denied.

5. All proceedings in this action relating to a determination of Winters Doctrine reserved rights are stayed pending a ruling by the Arizona Supreme Court on the issue of whether the Superior Court has jurisdiction of a concurrent action.

6. Paragraph 1B of the prayer of the first claim for relief is stricken because the relief requested in that paragraph should be considered by the Superior Court in *Hurley v. Abbott.*

7. All proceedings relating to the third, fourth and fifth claims for relief are stayed until the Supreme Court has finally ruled.

DATED this 25th day of January, 1985.

/s/ Charles L. Hardy
CHARLES L. HARDY
Judge of the United States
District Court

cc: all counsel of record

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